

ARTICLES

DOES THE ESTABLISHMENT CLAUSE MATTER? NON-ESTABLISHMENT PRINCIPLES IN THE UNITED STATES AND CANADA

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INTRODUCTION

The proper standard for application of the First Amendment Establishment Clause continues to be a matter of sharp dispute. Decades after the Supreme Court attempted to dispose of issues such as school prayer and government aid to religious schools, these matters remain highly contested. While separationists have some quarrels with current caselaw, most of the vocal criticism of the Court has come from accommodationists, both within and outside of the Court's own membership.

Accommodationists tend to argue that the Establishment Clause bars only three types of government action: coercion (defined narrowly) of religious belief or practice, favoritism of a preferred religion over other denominations, and direct financial support of purely religious activity by religious bodies. In contrast, separationists contend that the clause bars, at the very least, government endorsement of religious belief; favoritism not only towards a preferred religion but also of religion in general, and a wider scope of financial assistance to religious groups.

Attempts to resolve this dispute unsurprisingly have invoked justifications such as original intent, longstanding tradition, and underlying constitutional themes. Little attention has been paid to the approach taken by the courts of other nations to the problem of religious freedom. This is also unsurprising. Although the broad concept of religious freedom has been widely endorsed by the international community, relatively few nations include a specific prohibition of religious establishment in their constitutional documents. The United States Supreme Court, unlike the highest courts of some other nations, has been extremely reluctant to turn to the jurisprudence of other countries for guidance on constitutional questions.

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But perhaps we ignore something significant when we choose to interpret the scope of religious freedom and, in particular, its incorporation of the non-establishment principle, solely by focusing on the American experience. This Article will explore how the recent experience of Canadian courts in interpreting the right of religious freedom contained in the Canadian Charter of Rights and Freedoms may shed light on current American disputes over the religion clauses of the First Amendment.

The Canadian Charter has no explicit non-establishment clause, and yet Canadian courts have concluded that non-establishment principles are implicit in the Charter's guarantee of religious freedom. This suggests that the common assumption of Americans, that it is only the Establishment Clause that bars government support of religion and that the values of the Establishment Clause and those of the Free Exercise Clause are in tension, if not in conflict, is misguided. Even if there were no Establishment Clause, it is likely that American courts, like their Canadian counterparts, would be compelled to recognize that non-establishment principles are an essential component of the right to freely exercise religion.

Is, then, the Establishment Clause redundant, or does it serve in some significant way to reinforce non-establishment values implicit in the Free Exercise Clause? When Canadian courts find non-establishment values in a Charter of Rights that lacks an explicit establishment clause and protect those values more rigorously than strong accommodationists would enforce those non-establishment values under the First Amendment, should that serve as strong evidence that the accommodationist position is inadequate? This Article will attempt to address these questions.

Part I of this Article will briefly summarize the history and current state of the Supreme Court's religion clause jurisprudence. Part II will discuss the recognition, in the latter part of the twentieth century, of religious freedom as a basic right by international bodies, particularly those sharing with the United States a commitment to enforcing human rights. Part III will then focus specifically on the experience of Canadian courts in interpreting the Charter guarantee of religious freedom in cases that American courts would classify as presenting Establishment Clause concerns. Finally, Part IV will discuss the insights that American courts might draw from these Canadian cases in approaching First Amendment cases.

I. APPROACHES TO THE FIRST AMENDMENT RELIGION CLAUSES: A BRIEF HISTORY

The United States Supreme Court has wrestled with the scope and application of both the Establishment and Free Exercise Clauses for decades. In neither case has the Court been able to develop an en-

during consensus among the justices. Instead, the Court has struggled to balance the desire for some level of determinacy against both the difficulty of doing so where first principles remain hotly contested and the attractions of case-by-case balancing. A brief overview of the Court's history in dealing with each of the religion clauses will help us to understand the current state of the debate.

A. *The Establishment Clause*

Perhaps the persistent disagreement of the justices concerning the proper application of the Establishment Clause should not be surprising. Legal historians have noted that eighteenth century Americans supported the non-establishment principle for a number of distinctly different reasons.¹ Some feared that a religious establishment would threaten individual freedom; others feared that government support would ultimately threaten religion, by subordinating it to government control.² And since the First Amendment was originally a limit only on the national government, some who supported state religious establishments favored the clause because it would prevent Congress from overriding their local establishment with a different, national religion.³

In addition, it is clear that the authors of the clause were not drawing upon some clearly defined common law or internationally recognized concept. While the concept of freedom of religion, in the sense of toleration, antedated the First Congress,⁴ non-establishment as an independent principle was something quite new and rare.⁵ In

¹ See, e.g., Arlin M. Adams and Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559 (1989); Donald L. Drakeman, *Religion and the Republic: James Madison and the First Amendment*, 25 J. CHURCH & ST. 427 (1983); Carol Weisbrod, *On Evidences and Intentions: "The More Proof, the More Doubt,"* 18 CONN. L. REV. 803 (1986).

² Thus, we can contrast the views of Thomas Jefferson, who feared that orthodox religious believers would insist on political power to the detriment of individual rights, see WALTER BERNIS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 20-29 (1976), with adherents of the views of Roger Williams, who favored separation of church and state in order to protect the churches themselves from outside corrupting influence, see Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455 (1991).

³ Several New England states maintained elements of a religious establishment at the time of the ratification of the Bill of Rights, and for decades thereafter. See GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 20-26 (1987).

⁴ Professor Cole Durham notes that "[a]s early as the Peace of Westphalia in 1648, the right to religious liberty was afforded international protection. By the late 18th Century, religious liberty was afforded protection in a number of path breaking statutes . . ." W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in 2 RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 1 (Johan D. van der Vyver & John Witte, Jr., eds. 1996).

⁵ Even today, in western countries that adhere to the concept of religious freedom, many contend that this concept is not inconsistent with an established church. See *infra* notes 129-33 and accompanying text.

deed, as we will see in Part II, even today, non-establishment is rarely considered an essential part of a regime of human rights, although some variant of the free exercise principle is.⁶

The First Amendment was not incorporated into the Due Process Clause of the Fourteenth Amendment and escaped explicit application to the states until well into the twentieth century.⁷ Government action in support of religion had been much more likely to arise at the state and local levels, rather than the national level in the United States. Thus, prior to 1947, the United States Supreme Court addressed the Establishment Clause in only two cases, neither of which had a substantial impact on subsequent law.⁸ Some state courts handed down significant decisions interpreting non-establishment provisions of their state constitutions during this period,⁹ but in light of differences in the language and the history of each of these provisions,¹⁰ it would be difficult, and almost certainly deceptive, to try to formulate a consensus position of state courts in the nineteenth and early twentieth centuries on the question of what a non-establishment principle actually entailed.

Still, keeping in mind the dangers of oversimplification, we can detect some general trends. At the beginning of the nineteenth century, several states continued to explicitly recognize one denomina-

⁶ See *infra* notes 107-33 and accompanying text.

⁷ It was not until *Gitlow v. New York*, 268 U.S. 652 (1925), that the Supreme Court stated, in a case presenting free speech issues, that the First Amendment protections would be incorporated into the Fourteenth Amendment Due Process Clause and applied to the states. See *id.* at 666. The Court did not apply the Establishment Clause to the states until 1947, in *Everson v. Board of Education*, 330 U.S. 1 (1947).

⁸ In *Bradfield v. Roberts*, 175 U.S. 291 (1899), the Court upheld federal government aid to a hospital in the District of Columbia that was owned and operated by a Catholic religious order. The Court held that the hospital was chartered as a nonprofit corporation to care for the sick, that there was "nothing sectarian" in its charter, that this was "simply the case of a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church," and that therefore, government aid did not violate the Establishment Clause. See *id.* at 298-299. In *Quick Bear v. Leupp*, 210 U.S. 50 (1908), the Court permitted expenditure of Indian tribal funds, given to the tribe by the federal government under treaty obligations, to support religious schools chosen by the tribe. The decision stressed that the Indians had treaty rights to the funds, and the tribe, not the federal government, made the decision of how to use them. See *id.* at 80-82.

⁹ E.g., *Trost v. Ketteler Manual Training Sch. for Boys*, 118 N.E. 743 (Ill. 1918) (state aid to reform school run by Catholic organization did not violate Illinois constitution); *State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373 (Nev. 1882) (state aid to Catholic orphanage did violate Nevada constitution); *Weiss v. District Bd.*, 44 N.W. 967 (Wis. 1890) (prayer in public schools violates Wisconsin constitution); *Wilkerson v. City of Rome*, 110 S.E. 895 (Ga. 1921) (prayer in public schools does not violate Georgia constitution).

¹⁰ For an overview of early decisions under the non-establishment provisions of state constitutions, see CHESTER J. ANTIEAU, PHILLIP M. CARROLL & THOMAS C. BURKE, *RELIGION UNDER THE STATE CONSTITUTIONS* 1-64 (1965).

tion as established, although others would be tolerated.¹¹ As the century progressed, the single established church became extinct,¹² but it was quite common for states to favor Christian denominations or individuals over non-Christians.¹³ By the end of the century, the norm was equal treatment for all religions, but favoritism of religion in general over irreligion was considered unremarkable.¹⁴

Against this historical background, the Supreme Court took its first significant steps into the Establishment Clause quagmire in the late 1940s. When a sharply divided Court in *Everson v. Board of Education*¹⁵ upheld the New Jersey practice of providing school bus service to parochial, as well as public school students, the apparently accommodationist result may have been less important than the ringing separationist language in which it was couched. Writing for the Court, Justice Black drew heavily on the writings of Jefferson and other Virginia anti-establishment figures to conclude that the core of the Establishment Clause was the maintenance of a "wall of separation."¹⁶

That wall, according to Black, meant "at least" that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."¹⁷ Insofar as it addressed preference for one religion over another, this statement seems entirely consistent with principles that, while once disputed, had gained general acceptance by the twentieth century. But the clause condemning aid to "all religions" as against irreligion, was much more controversial.

While all justices endorsed this approach of strict neutrality, they were sharply divided on its application. A corollary of the requirement that religion not be privileged is that it also not be disadvantaged. While four dissenters saw the provision of bus transportation as improper "aid" to religion, Justice Black and the majority saw it as

¹¹ For a discussion of the various approaches that states took toward religious establishments and the different definitions of the term that they employed during the revolutionary period, see THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 134-92 (1986).

¹² Connecticut, in 1818, and Massachusetts, in 1833, were the final states to abandon government preference for a single denomination. See ANSON PHELPS STOKES & LEO PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 73-78 (rev. one-vol. ed. 1964).

¹³ Thus, Joseph Story maintained that the religion clauses did not mean "to countenance, much less to advance Mahometanism, or Judaism, or infidelity . . . but to exclude all rivalry among Christian sects." 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 728 (1833).

¹⁴ As late as 1961, Maryland required officeholders to affirm "belief in the existence of God," a requirement that was found unconstitutional in *Torcaso v. Watkins*, 367 U.S. 488, 489 (1961).

¹⁵ 330 U.S. 1 (1947).

¹⁶ *Id.* at 16. Jefferson's letter to the Danbury Baptist Association, which contained the wall metaphor, is quoted at length in *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

¹⁷ *Everson*, 330 U.S. at 15.

no different than having the police and fire departments protect church property as they protect all other property.¹⁸ In other words, the buses served to further, rather than to undermine, government neutrality.¹⁹

The difficulty of fixing the boundary between neutrality and favoritism would continue to play a significant role in religion clause jurisprudence.²⁰ The most lasting legacy of *Everson* would be the confident assertion that government must maintain a strict neutrality, not merely among religions, but between religion in general and irreligion. Some would object to this assertion, claiming that it went well beyond the intentions of the eighteenth century Framers.²¹ Yet, it might also be argued that strict neutrality among religions was not clearly what the Framers had in mind either. Few of those men would be shocked by government action that preferred Christianity over other faiths.²² But by the mid-twentieth century, and surely today, few would question that the Establishment Clause commands, at least, equal treatment of all faiths. *Everson*, then, can be seen as a further step in the evolutionary expansion of our understanding of the meaning of non-establishment. *Everson* was not the first departure from the views of the First Congress, but rather one that, rightly or wrongly, built upon earlier changes.

After *Everson*, the Court handed down two decisions dealing with school district policies of "release time" for public school students to attend weekly religious instruction.²³ The cases held that such release time programs were impermissible where the instruction took place

¹⁸ "Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment State power is no more to be used so as to handicap religions than it is to favor them." *Id.* at 18.

¹⁹ *Id.*

²⁰ See, e.g., *Agostini v. Felton*, 521 U.S. 203, 226 (1997) (holding that the state may send public school teachers into religious schools to provide secular services under Title I of the Elementary and Secondary Education Act of 1965); *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 862 (1995) (ruling that a state university may not deny funding to a student publication on grounds of its religious content); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (holding that neutrality requires that a state university allow religious student groups equal access to its facilities). In each of these cases, several justices filed vigorous dissenting opinions.

²¹ See, e.g., Robert L. Cord, *Founding Intentions and the Establishment Clause: Harmonizing Accommodation and Separation*, 10 HARV. J.L. & PUB. POL'Y 47 (1987); Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 856 (1986) ("I am hard put to find any evidence in the development of legal protection for religious freedom that indicates any intention to protect atheists.").

²² For Justice Story's views, see STORY, *supra* note 13.

²³ See *Zorach v. Clausen*, 343 U.S. 306 (1952) (holding that release time did not violate Establishment Clause when religious instruction occurred outside of school grounds); *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) (finding that release time violated the Establishment Clause because religious classes were conducted in regular schoolrooms in the school building).

on public school premises,²⁴ but permissible when students left the public facility to receive religious instruction.²⁵ This pragmatic compromise on the issue, together with some accommodationist language in the latter case,²⁶ seemed to soften the rigid separationist tone of *Everson*. Neither of these cases, however, set forth any framework to apply in future Establishment Clause cases. Nor did either of these cases arouse the firestorm of opposition that would arise following the Court's next foray into the Establishment Clause thicket.

In the early 1960s, the Supreme Court held that public school sponsored, organized prayer²⁷ and daily, devotional Bible reading²⁸ were practices that violated the Establishment Clause, notwithstanding the fact that individual students could be excused,²⁹ and the fact that, in the case of the daily prayer, care was taken to make the prayer as nondenominational and inoffensive as possible.³⁰ These cases, which set off a firestorm of protest and decades of local attempts to overturn or skirt their holdings,³¹ also were the first to articulate a standard for application in all Establishment Clause cases. In order to survive an Establishment Clause challenge, held the Court, a statute or practice must have a secular purpose (although that need not be its only purpose) and must not have as its primary effect the advancement of religion.³²

Later in the decade, the Court's Establishment Clause focus shifted from the presence of religion in public schools to attempts by several states to provide forms of aid to private religious schools. In

²⁴ See *McCollum*, 333 U.S. at 203 (involving religious training on public school premises).

²⁵ See *Zorach*, 343 U.S. at 306 (involving the practice of releasing students during the school day to receive religious instruction outside of the public school).

²⁶ Justice Douglas, writing for the Court, stated: "We are a religious people whose institutions presuppose a Supreme Being When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions." *Id.* at 313-14. *Zorach*, of course, is another example of the difficult task of drawing the line between neutrality and favoritism.

²⁷ See *Engel v. Vitale*, 370 U.S. 421 (1962).

²⁸ See *Abington Township v. Schempp*, 374 U.S. 203 (1963).

²⁹ See *Engel*, 370 U.S. at 423-24; see also *Schempp*, 374 U.S. at 205.

³⁰ The prayer at issue, crafted by the New York State Board of Regents, was "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Engel*, 370 U.S. at 422. The Court found that government actually composing an official prayer was an act reminiscent of classic religious establishments. See *id.* at 425-26.

³¹ Over 150 proposals to amend the Constitution to permit school prayer have been introduced in Congress. See Geoffrey R. Stone, *In Opposition to the School Prayer Amendment*, 50 U. CHI. L. REV. 823, 826 (1983). See also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (invalidating practice of religious invocations prior to public high school football games); *Lee v. Weisman*, 505 U.S. 577 (1992) (invalidating practice of school sponsored religious invocations at public high school graduation ceremonies); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down the "moment of silence" requirement because its purpose was to promote religion).

³² See *Schempp*, 374 U.S. at 222.

1968, the Court, following *Everson*, held that states could adopt a program of loaning textbooks in secular subjects such as math and science to students attending religious schools.³³ The purpose and primary effect of these programs, the Court held, was to advance education in these secular areas of knowledge.³⁴ Encouraged by this decision, Rhode Island and Pennsylvania went further, enacting programs that would provide state money to supplement the salaries of the teachers of these secular subjects who were employed by private religious schools.³⁵

The Court, however, drew a line between these programs and earlier cases, and in doing so, framed the enduring three-part test for Establishment Clause cases. In *Lemon v. Kurtzman*,³⁶ the Court began its analysis with the two-part test applied in earlier cases. While the salary supplements could easily be seen to be motivated by the goal of furthering education in secular subjects, the effect part of the test was more troubling. While the primary effect of a textbook could be measured by its contents, a live teacher, partially supported by state funds, might inject substantial doses of religious doctrine into any subject matter.³⁷ Anticipating this, the states had provided for government monitoring of the performance of state-supported teachers to assure that they stuck close to their secular areas of expertise.³⁸

But this effort to assure compliance with the "secular effect" prong of the test created a new problem. In the 1970 case of *Walz v. Tax Commission of New York*,³⁹ in upholding the practice of granting tax exemptions to religious as well as other charitable property, against an Establishment Clause challenge,⁴⁰ the Court stressed that the First Amendment also forbade "excessive government entanglement" with religious organizations.⁴¹ This would serve to prohibit not only such things as governments delegating power to religious organizations, but also excessive supervision of religion by government.

³³ See *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

³⁴ See *id.* at 243-47.

³⁵ See R.I. GEN. LAWS § 16-51-1 et seq. (1970); PA. STAT. ANN. tit. 24, §§ 5601-5609 (1971).

³⁶ 403 U.S. 602 (1971).

³⁷ "We need not and do not assume that teachers in parochial schools will be guilty of bad faith We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." *Id.* at 618.

³⁸ See *id.* at 619-21.

³⁹ 397 U.S. 664 (1970).

⁴⁰ The New York State Constitution authorized tax exemptions for "real or personal property used exclusively for religious, educational or charitable purposes . . . not operating for profit." *Id.* at 666-67 (quoting N.Y. CONST. art. XVI, § 1).

⁴¹ *Id.* at 674. The Court found that "[e]limination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow" *Id.*

This requirement was added to the purpose and effect inquiries to form what would become known as the three-part *Lemon* test. In *Lemon* itself, the salary supplements could not stand. If extensively supervised, the program would fail the entanglement inquiry; while if unsupervised, the state could not establish that the primary effect of the work of subsidized teachers would be secular.⁴²

Over the years, the *Lemon* test has not provided a great deal of predictability to Establishment Clause cases. Each of its three inquiries, especially the question of how to classify the primary effect of a government action, is sufficiently open-ended to make outcomes at least arguably unpredictable, and perhaps even inconsistent.⁴³ Separationists would object to decisions that applied the *Lemon* test less rigorously.⁴⁴ But in recent years, the most vigorous opposition to *Lemon* has come from the accommodationist side.⁴⁵ This criticism has often challenged the basic assumptions, dating back to *Everson*, on which the *Lemon* test was based.

A series of Establishment Clause cases beginning in the mid-1980s gave several justices the opportunity to critique the *Lemon* test, and put forward refinements or alternative approaches. Some justices continued to apply *Lemon* without much elaboration upon the test; for the most part, these justices took relatively strong separationist positions.⁴⁶ But strong separationism did not consistently prevail.

⁴² "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that . . . the First Amendment [is] . . . respected These prophylactic contacts will involve excessive and enduring entanglement between state and church." *Lemon*, 403 U.S. at 619.

⁴³ This was especially true in cases involving state aid to religious schools. Compare *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973) (holding that the state may not reimburse religious schools for the cost of administering state-mandated but teacher-prepared tests) with *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980) (holding that the state may reimburse religious schools for the cost of administering state-mandated and state-prepared tests); compare *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968) (holding that a state may furnish free text books to public and parochial school children) with *Wolman v. Walter*, 433 U.S. 229 (1977) (finding that a state may not lend maps or audio-visual equipment to church-related schools).

⁴⁴ See, e.g., *Tilton v. Richardson*, 403 U.S. 672, 689-97 (1971) (Douglas, J., joined by Black and Marshall, JJ., dissenting) (disagreeing with the Court's less rigorous application of the *Lemon* test in a case involving higher education); *Zobrest v. Catalina Foothills Sch. Dist.* 509 U.S. 1, 14-24 (1993) (Blackmun, J., dissenting).

⁴⁵ The most acerbic accommodationist criticism of *Lemon* comes, not surprisingly, from Justice Scalia, who has written that the *Lemon* test is like "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried When we wish to strike down a practice it forbids, we invoke it . . . when we wish to uphold a practice it forbids, we ignore it entirely." See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring) (citations omitted).

⁴⁶ See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down a state requirement that students be taught "creation science" as having no secular purpose); *Stone v. Graham*, 449 U.S. 39 (1980) (striking down as having no secular purpose a state requirement that each public school classroom post a copy of the Ten Commandments).

Separationist outcomes depended on the votes of centrist justices, particularly Justice O'Connor. Beginning with *Lynch v. Donnelly*,⁴⁷ in which a divided Court upheld the constitutionality of a city-sponsored Christmas display that included, among other things, a crèche, Justice O'Connor put forward what, in her view, was not an alternative to *Lemon*, but rather a more focused way of applying the test, particularly, the crucial second step. In determining whether the primary effect of a government practice was religious, according to Justice O'Connor, the central inquiry should be whether a well-informed outside observer would conclude that by engaging in this challenged activity, government was endorsing religion, or instead merely recognizing its presence in the community.⁴⁸ Significantly, this "non-endorsement" test does not challenge the basic premise of the *Everson-Lemon* line of cases—that is, that the Establishment Clause goes beyond prohibiting favoritism among religions to prohibit favoritism of religion in general.

Much has been written both in support and opposition to Justice O'Connor's non-endorsement test.⁴⁹ In recent years, justices who support this test have provided the crucial swing votes necessary to gain a majority for either the adherents of strong forms of separationism, or strong forms of accommodation.⁵⁰ But this Article will focus more on the views of those Justices who have rejected not merely the non-endorsement test, but the entire *Lemon* framework, and to some extent, the view of the Establishment Clause put forward in *Everson* itself.

To these accommodationist justices, most notably Justice Scalia, the entire *Lemon* framework can and should be discarded, and replaced with two or three allegedly more focused and determinate questions. First, and perhaps most prominently, Justice Scalia would ask not whether the government practice in question endorses religion, but rather whether it goes so far as to coerce anyone's religious

⁴⁷ 465 U.S. 668 (1984).

⁴⁸ "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message" *Id.* at 688 (O'Connor, J., concurring).

⁴⁹ See, e.g., Steven G. Gey, *When Is Religious Speech Not "Free Speech"?*, 2000 U. ILL. L. REV. 379 (supporting the non-endorsement test); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049 (1986) (supporting the non-endorsement test); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992) (criticizing the non-endorsement test); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987) (criticizing the non-endorsement test).

⁵⁰ See, e.g., *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 772-83 (1995) (O'Connor, J., joined by Souter and Breyer, JJ., concurring). See also *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), and *infra* notes 57-58.

belief or practice.⁵¹ If a practice is non-coercive, it would run afoul of the Establishment Clause only if it privileges one religion, or subset of religions, over another.⁵² In other words, this view essentially rejects the notion, initially set forth in *Everson*, that religion in general may not be favored over irreligion.⁵³

The accommodationist framework may also have a third component, although the precise boundaries of this component are less clear. It has long been assumed that the Establishment Clause prohibits government from providing direct financial assistance to religious organizations for the performance of purely religious activity.⁵⁴ But this principle is so well understood, and the instances in which government has sought to aid religious organizations have so overwhelmingly involved situations where the organizations were performing an activity with both secular and religious effects, that this "no direct aid" principle seems not to offend most accommodationists.⁵⁵ Accommodationists, however, are much more likely to permit aid to religious organizations where the aid arguably has both secular and religious effects.

Advocates of the non-coercion test would contend that it better reflects the original intent of the Establishment Clause,⁵⁶ but would also stress that it would seem to provide much more predictability than either the unadorned *Lemon* test, or the non-endorsement principle. Yet this clarity may be largely illusory; is the concept of coercion really more precise than the concept of endorsement? Justice Kennedy wrote in favor of the non-coercion principle in *County of Allegheny v. ACLU*,⁵⁷ arguing that neither the presence of a crèche in the lobby of the Allegheny County Courthouse, or a menorah in a public

⁵¹ See *Lee v. Weisman*, 505 U.S. 577, 640-42 (1992) (Scalia, J., dissenting). Justice Scalia would limit the scope of objectionable coercion to government "acts backed by threat of penalty." *Id.* at 642.

⁵² "And I will further concede that our constitutional tradition . . . has . . . ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." *Id.* at 641. Justice Souter presents historical evidence that the Establishment Clause should not be limited to prohibiting nonpreferential state support of religion. *Id.* at 612-18 (Souter, J., concurring).

⁵³ See *supra* notes 15-17 and accompanying text.

⁵⁴ See *Everson v. Bd. of Educ.*, 330 U.S. 1, 10-16 (1947).

⁵⁵ Thus, Justice Scalia states that he "will . . . acknowledge for the sake of argument that . . . by 1790 the term 'establishment' had acquired an additional meaning—'financial support of religion generally, by public taxation' . . ." *Lee*, 505 U.S. at 641 (Scalia, J., dissenting).

⁵⁶ See, e.g., *id.* at 632-36 (Scalia, J., dissenting).

⁵⁷ 492 U.S. 573 (1989).

park outside the Courthouse was coercive, and that neither, in his view, was impermissible.⁵⁸

But shortly after *County of Allegheny*, Justice Kennedy provided the deciding vote in *Lee v. Weisman*,⁵⁹ in which the Court held that a school-sponsored religious invocation at public high school graduation ceremonies violated the Establishment Clause. While Justice Scalia and other accommodationists could find nothing coercive about this practice, Justice Kennedy found the atmosphere to be psychologically coercive, and joined with the Court's non-endorsement bloc.⁶⁰ Coercion, then, has multiple possible meanings, perhaps as many as endorsement. At the very least, *Lee* illustrates that, at least in some cases and to some justices, there may be little difference between the tests.

Thus, the proper approach to the Establishment Clause is currently highly contested. Although the strong separationist sentiments echoed in *Everson* still have some support on the Supreme Court, contemporary debate has largely focused on the choice of either the non-endorsement approach to *Lemon*, or the replacement of *Lemon* with the non-coercion standard. This Article, rather than asking the perhaps unanswerable question of which approach more accurately reflects original intent, will explore one practical aspect of the possible adoption of the non-coercion test and the rest of the accommodationist position: will it render the Establishment Clause largely or entirely redundant? In order to approach that question, it will first be necessary to take note of the First Amendment's other command regarding religion, the Free Exercise Clause.

B. The Free Exercise Clause

The Free Exercise Clause, like the Establishment Clause, received little attention in the Supreme Court before the middle of the twentieth century. In two late nineteenth century cases,⁶¹ the Court faced the question of whether the Free Exercise Clause would protect Mormon polygamists from criminal or other punishment under the law governing pre-statehood western territories.⁶² In rejecting the po-

⁵⁸ *Id.* at 663-68 (Kennedy, J., concurring in part and dissenting in part). The Court held that the menorah, placed in a public park, did not violate the Establishment Clause, but that the display of a crèche in the county courthouse was such a violation. *See id.* at 621.

⁵⁹ 505 U.S. 577 (1992).

⁶⁰ *Id.* at 592-94.

⁶¹ *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1879).

⁶² In *Reynolds*, the defendant was convicted of bigamy. *See Reynolds*, 98 U.S. at 146. *Davis* involved an Idaho territorial statute that went even further, requiring that all voters take an oath swearing that they were neither polygamists nor advocates of polygamy. *See Davis*, 133 U.S. at 334. *Davis* was convicted of conspiring with other Mormons to falsely take the oath. *See id.* at 335.

lygamists' claims, the Court drew a distinction that would survive for decades. The Free Exercise Clause, it held, was meant to protect belief and expression of belief, but did not require the government to grant religious believers an exemption from laws regulating actions that could reasonably be applied to the community as a whole.⁶³

Religious believers achieved several victories before the 1960s, but each of these victories could easily be explained without reference to the Free Exercise Clause. *Pierce v. Society of Sisters*⁶⁴ and *Meyer v. Nebraska*,⁶⁵ establishing the right of parents to choose a private education for their children, could be seen as vindication of a right of parental or familial autonomy. Cases establishing the right of minority religions to preach in public,⁶⁶ or the right to exercise a religious-based refusal to salute the flag,⁶⁷ could be decided simply by reference to the Free Speech Clause of the First Amendment.

But the 1960s saw the emergence of a much stronger Free Exercise Clause. In *Sherbert v. Verner*,⁶⁸ the Court held that a state could not deny unemployment benefits to an applicant who refused employment that would require work on Saturday, which would violate her Seventh Day Adventists principles.⁶⁹ The Court held that where a claimant could show that the application of a law seriously infringed upon the practice of her religion, the state would be required to provide an exemption unless it could show that denying the exemption was necessary to achieve the compelling interest behind the statute or practice.⁷⁰ In other words, a free exercise claim would require that the government action be subjected to "strict scrutiny."⁷¹

The high-water mark for application of the Free Exercise Clause was the Supreme Court's decision in *Wisconsin v. Yoder*⁷² in 1972. The Court held that the Wisconsin statute requiring school attendance until the age of 16, in effect requiring two years of high school, could

⁶³ The Court stated that, pursuant to the First Amendment, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." *Reynolds*, 98 U.S. at 164. The Court continued, "Laws . . . cannot interfere with mere religious belief and opinions, [but] they may with practices." *Id.* at 166.

⁶⁴ 268 U.S. 510 (1925).

⁶⁵ 262 U.S. 390 (1923).

⁶⁶ See *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (reversing the breach of peace conviction of a Jehovah's Witness minister on First Amendment grounds).

⁶⁷ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁶⁸ 374 U.S. 398 (1963).

⁶⁹ *Id.* at 399-400.

⁷⁰ *Id.* at 406-09.

⁷¹ The concept of strict scrutiny has been most thoroughly developed in cases involving claims that government has violated the Equal Protection Clause of the Fourteenth Amendment. See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-6, at 1451-74 (2d ed. 1988).

⁷² 406 U.S. 205 (1972).

not be enforced against the Old Order Amish, who objected to formal education beyond the eighth grade on the grounds that high school promoted values that were destructive of the Amish religious community.⁷³ In light of the history of the Amish community, and its success in providing practical, post-elementary school education to its children, sufficient to make them productive members of that community, and not burdens to society at large, the Court held that denial of the exemption was not necessary to achieve the admittedly compelling interest of the state in assuring an educated citizenry.⁷⁴

In the years following *Yoder*, the Court backed away from vigorous free exercise enforcement. Throughout the rest of the 1970s and 1980s, the Court applied the language of strict scrutiny to a series of free exercise claims, but in sharp contrast to the widespread view that strict scrutiny leads to almost inevitable invalidation of the government act in question, not a single post-*Yoder* Supreme Court decision found a Free Exercise Clause violation. While some of these cases could be said to present instances where an exemption could seriously threaten the government interest involved,⁷⁵ other cases presented situations where the state interest seemed less than compelling⁷⁶ or where denial of the exemption seemed hardly likely to seriously impair the government interest.⁷⁷

This apparent tension between the Court's strict scrutiny language and its deference to government interests in free exercise cases was resolved by the majority of the justices by abandoning the *Sherbert* framework in *Employment Division v. Smith*.⁷⁸ Writing for the Court, Justice Scalia held that strict scrutiny would be appropriate only where a free exercise claim was combined with some additional con-

⁷³ The Court in *Wisconsin v. Yoder* wrote:

The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of 'goodness' rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.

Id. at 211.

⁷⁴ *Id.* at 221-29.

⁷⁵ *E.g.*, *United States v. Lee*, 455 U.S. 252 (1982) (holding that an exemption from obligation to pay social security tax would threaten continued existence of the Social Security system); *Gillette v. United States*, 401 U.S. 437 (1971) (holding that conscientious objector status exempting one from military draft on the basis of opposition to a particular war, rather than general pacifist conviction, would threaten administration of selective service system).

⁷⁶ *See, e.g.*, *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (holding that a state interest in regulating flow of crowds at state fair justifies absolute ban on solicitation of funds except from fixed booths).

⁷⁷ *See, e.g.*, *Goldman v. Weinberger*, 475 U.S. 503 (1986) (holding that an exemption from military dress code regulations permitting an orthodox Jewish officer to wear a yarmulke while indoors would threaten compelling government interests).

⁷⁸ 494 U.S. 872 (1990).

stitutional rights claim, as in *Yoder's* combination of free exercise and family autonomy concerns,⁷⁹ or when the statute or practice in question was not a generally applicable law addressing a legitimate government concern, but rather was targeted at a particular religious practice because of its religious aspects.⁸⁰

Smith was greeted with widespread disapproval. Several Justices dissented,⁸¹ and have continued to maintain that the decision is misguided.⁸² Congress attempted to restore pre-*Smith* strict scrutiny through enactment of the Religious Freedom Restoration Act,⁸³ but that act, at least insofar as it applied to free exercise claims brought against states and their subdivisions,⁸⁴ was declared unconstitutional by the Supreme Court as an improper exercise of its power to enforce the Fourteenth Amendment.⁸⁵ A number of states have, in the wake of *Smith*, declared that their state constitution guarantee of religious freedom requires that strict scrutiny be applied to any application of state law that imposes a significant burden on a religious practice.⁸⁶

⁷⁹ *Id.* at 881-83. Of course, where free exercise concerns are present in addition to other concerns, such as family autonomy or free speech, it is not clear why the free exercise claim is anything more than redundant.

⁸⁰ The *Smith* principle applies to cases "involving a neutral, generally applicable regulatory law." *Id.* at 880. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court struck down a city's ban on ritual slaughter of animals, finding it to have been targeted specifically at the religious aspects of the act, rather than at genuine, secular concerns. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

⁸¹ Justices Blackmun, Brennan and Marshall dissented in *Smith*. See *Smith*, 494 U.S. at 907-21 (Blackmun, J., dissenting). Justice O'Connor, while concurring in the result, disagreed with the Court's rationale, and would, along with the dissenters, have applied strict scrutiny. See *id.* at 891-907 (O'Connor, J., concurring).

⁸² See *Church of Lukumi Babalu Aye*, 508 U.S. at 577-80, where Justice Blackmun and Justice O'Connor reaffirm their disagreement with the *Smith* standard. In the same case, Justice Souter, who was not on the Court in 1990, expressed his discomfort with the *Smith* standard. See *id.* at 559-77 (Souter, J., concurring). See also *City of Boerne v. Flores*, 521 U.S. 507, 544-65 (1997) (O'Connor, J., dissenting); and *id.* at 565-66 (Souter, J., dissenting).

⁸³ 42 U.S.C. § 2000bb, et seq. (1994). The Act would require courts to grant free exercise exemptions where the claimant could demonstrate a substantial burden on religious exercise, unless the government could show that the burden was the least restrictive means of furthering a compelling government interest.

⁸⁴ The Act was to apply to any part of the federal government and also to any state or subdivision of a state. See 42 U.S.C. § 2000bb-2. Congress justified its power to apply the Act to states and their subdivisions by reference to its power under Section 5 of the Fourteenth Amendment, in order to enforce guarantees against the states. See *Flores*, 521 U.S. at 516-17.

⁸⁵ See *Flores*, 521 U.S. at 536. The Court limited congressional power under Section 5 of the Fourteenth Amendment to enforcing rights as defined by the Court, rather than establishing the scope or definition of the rights themselves.

⁸⁶ See generally Tracey Levy, Comment, *Rediscovering Rights: State Courts Reconsider the Free Exercise Clauses of Their Own Constitutions in the Wake of Employment Div. v. Smith*, 67 TEMPLE L. REV. 1017 (1994). Congress also responded to *Flores* by enacting a narrower religious freedom act, the Religious Land Use and Institutionalized Persons Act of 2000. See 42 U.S.C. § 2000cc (2000). The Act calls for strict scrutiny where a challenger to a land use regulation or a prison rule establishes that such a rule or regulation substantially impairs a substantial burden on relig-

Still, *Smith* remains as controlling precedent for the First Amendment Free Exercise Clause. While some government action will violate the *Smith* standard,⁸⁷ the current free exercise standards give government far more leeway in denying religious-based exemptions from generally applicable laws. Thus, those seeking such exemptions can be expected to approach the legislature, rather than the courts. At this point, the Free Exercise and Establishment Clauses come together in an interesting fashion. Does an exemption from a generally applicable law on religious grounds create significant Establishment Clause problems? Prior to *Smith*, a negative response to this question could easily be based upon the government's compelling interest to avoid violating free exercise rights. But with exemptions no longer compelled by the Free Exercise Clause it becomes more difficult to reconcile a robust Establishment Clause with such legislative exemptions. Justice Scalia's opinion in *Smith* made it quite clear that he expected religious believers to seek and often gain legislative exemptions;⁸⁸ clearly he sees nothing in the Establishment Clause to cast constitutional doubt on such exemptions.⁸⁹ But this does create a situation that is troubling. Religions with large followings will surely find a more receptive legislature when they seek accommodation; minority religions will have a harder time rallying public and legislative support. Does such a result violate what almost all would concede to be a core principle of non-establishment, that at the very least, government may not prefer one religion over another?

This illustrates the clear connection between the non-establishment principle and the free exercise principle, but at the same time, illustrates the tendency of American courts to treat the two religion clauses of the First Amendment as presenting separate, distinct issues. Does this tendency to classify a religious freedom question as belonging to one, but not the other, of the clauses perhaps contribute to the current state of dissatisfaction with religion clause jurisprudence? When we look beyond the borders of the United States, we will see a growing sensitivity to issues of religious

ious exercise. *Id.* By narrowing the focus of the Act to land use regulation, which implicates Article I of the Commerce Clause, and protection of the rights of the institutionalized, which is already a matter of federal concern, the supporters of this statute attempt to avoid the problem in *Flores*. See *Flores*, 521 U.S. at 536.

⁸⁷ See *Church of Lukumi Babulu Aye*, 508 U.S. at 520.

⁸⁸ "[A] society that believes in the [First Amendment] protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required" *Smith*, 494 U.S. at 890.

⁸⁹ "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself" *Id.*

freedom in much of the international community, but for the most part, this concern is expressed without the explicit expression of a non-establishment principle. Does this mean that non-establishment values are not respected?

II. FREEDOM OF RELIGION: INTERNATIONAL PERSPECTIVES

Governments can take a wide variety of positions on the proper relationship between religion and the state. Professor W. Cole Durham has provided a very useful catalog of these different approaches.⁹⁰ At one extreme, there are nations with a single established church. This group may be subdivided into those that do not tolerate competing faiths, those that tolerate some, but not all, competing churches, and those that, while maintaining an establishment, guarantee, allow for full religious freedom for all other faiths.⁹¹ Closely related to the more tolerant examples of established churches are what Durham labels "endorsed churches." Here the constitution will "fall just short of formally affirming that one particular church is the official church of a nation, but acknowledges that one particular church has a special place in the country's traditions."⁹² Despite formal endorsement of one church, others will be entitled to equal treatment.⁹³

Durham's next category consists of "cooperationist regimes."⁹⁴ No religion will be formally endorsed, but government will, instead, cooperate with religious organizations, often with state funding.⁹⁵ But, as Durham points out, the widely varying size of denominations, and their different needs and activities, can often lead to a cooperationist system that in fact works in a way that gives preference to majority faiths.⁹⁶

A step away from cooperationism is the category of "accommodationist" systems.⁹⁷ An accommodationist system, in Durham's classification, "might be thought of as cooperationism without the provision of any direct financial subsidies to religion or religious education."⁹⁸ An accommodationist regime might, for example, provide generous exemptions from obligations that burden religious exercise, and

⁹⁰ W. Cole Durham, *supra* note 4, at 1.

⁹¹ *Id.* at 19-20.

⁹² *Id.* at 20.

⁹³ *Id.*

⁹⁴ *Id.* at 20-21.

⁹⁵ "Spain, Italy and Poland as well as several Latin American countries follow this pattern."
Id. at 21.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

might also permit a considerable amount of religious symbolism in public places or events.⁹⁹

Further along the spectrum, Durham places "separationist regimes."¹⁰⁰ These systems can range from those that "differ[] relatively little from accommodationism," merely banning religious symbols from public places and events, to more extreme forms that force religion to retreat from public life over a broad range of activity, perhaps giving monopolies to the government in the provision of education and social services.¹⁰¹ Closely related to these more extreme forms of separationism, Durham places "inadvertent hostility," which exists when government acts with disregard for the negative effects of its actions on religious groups or believers.¹⁰²

Finally, of course, government may engage in overt hostility or persecution of religion, which can range from placing civil disadvantages on believers or churches, to outright criminalization and imprisonment for religious activity.¹⁰³ We have, of course, seen similar persecution earlier in our description of different types of church-state relationships. But that, interestingly enough, did not occur in those types of regimes that contained the least degree of unity of government and religion, but in those that insist on the most. And this, more than the mere description of the various types of church-state relationships, is at the heart of the most interesting conclusion that Durham draws from his typology.

One might easily assume that there is a simple, positive correlation between the degree of religious freedom in a society and the degree of positive support that government gives to religion. But we quickly see that this is not the case. An intolerant form of establishment will be just as oppressive to minorities as will a government that persecutes all religion; the difference will be limited to the question of which groups are oppressed in each society.

Thus the surface tension in American constitutional law between free exercise and establishment values may prove highly deceptive. If religious freedom is minimized by either a theocratic regime or one that actively persecutes religion, then it is maximized by avoiding, so far as possible, either of these extremes.¹⁰⁴ In other words, if religious freedom is the ultimate goal, it can best be achieved by incorporating both free exercise and establishment values.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 21-22.

¹⁰¹ *Id.* at 22.

¹⁰² *Id.* at 22-23.

¹⁰³ *Id.* at 23.

¹⁰⁴ Professor Durham sets forth a model in which accommodation is the polar opposite of both persecution and absolute theocracy, both of which represent the complete absence of religious freedom. *See id.* at 23.

We may be able to assume that religious freedom is the ultimate goal of the religion clauses of the First Amendment,¹⁰⁵ but how true is that of the constitutional or statutory approaches of other nations? Clearly, religious freedom is not a value that is universally endorsed. A number of non-western nations quite openly strive to impose some degree of theocracy, providing, at most, some minimal degree of tolerance for religious dissent.¹⁰⁶ But the international community has made several attempts to define religious freedom and include it in the catalog of recognized human rights.

In the aftermath of World War I, the Covenant of the League of Nations required that states that had been granted mandates by the League to govern territories and prepare them for self-governance guarantee freedom of conscience and religion.¹⁰⁷ Following World War II, the United Nations adopted the Universal Declaration of Human Rights,¹⁰⁸ which includes Article 18:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.¹⁰⁹

The most significant international instrument focusing specifically on the question of religious freedom is the United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief,¹¹⁰ adopted by the General Assembly in 1981. The Declaration begins with these broad provisions:

ARTICLE 1

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of choice, and freedom, either individually or in community with others, and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

¹⁰⁵ Thus, while there was disagreement about just what religious liberty entailed, and about the best way to protect it, religious freedom was the "core value" behind both the Free Exercise and Establishment Clauses. See Adams & Emmerich, *supra* note 1, at 1598-1604.

¹⁰⁶ Perhaps the most prominent current examples are some Islamic nations that explicitly do not provide religious minorities the protections generally called for by international human rights law. See generally ANNE. MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 143-61 (1991).

¹⁰⁷ See generally Nathan Lerner, *Religious Human Rights Under the United Nations*, in 2 RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 4, at 79, 84. The League of Nations provisions involving religion and conscience were part of a movement between World War I and World War II to adopt measures for the protection of national and cultural minorities. *Id.*

¹⁰⁸ G.A. Res. 217A(III), U.N. GAOR, at 71, U.N. Doc. A/811 (1948).

¹⁰⁹ *Id.* Art. 18.

¹¹⁰ G.A. Res. 36/55, U.N. GAOR, 36th Sess. (1981).

2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

ARTICLE 2

1. No one shall be subject to discrimination by any State, institution or group of persons or person on the grounds of religion or belief.¹¹¹

These provisions were not adopted without significant dissent,¹¹² and obviously not all nations adhere to, or even make a showing of adherence to these mandates. Still, these documents are evidence of significant international endorsement of the notion of religious freedom. It is also obvious that a significant number of nations have made genuine efforts to implement principles of religious freedom. The European and North American participants in the Conference on Security and Cooperation in Europe, in 1989, issued the Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States,¹¹³ which included a detailed elaboration of the specifics of religious freedom, as understood by western governments. Principles 16 and 17 of the Document state:

16. In order to ensure the freedom of the individual to profess and practice religion or belief the participating States will, inter alia,

16a take effective measures to prevent and eliminate discrimination against individuals or communities, on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, political, economic, social and cultural life, and ensure the effective equality between believers and non-believers;

16b foster a climate of mutual tolerance and respect between believers of different communities as well as between believers and non-believers;

16c grant upon their request to communities of believers, practicing or prepared to practice their faith within the constitutional framework of their states, recognition of the status provided for them in their respective countries;

16d respect the right of religious communities to establish and maintain freely accessible places of worship or assembly, organize themselves ac-

¹¹¹ *Id.* Arts. 1-2.

¹¹² Particular problems were presented by the objection of some Islamic nations to the recognition of the right to change one's religion, and the related rights to proselytize or carry on missionary activities meant to cause others to change their religion. See Lerner, *supra* note 107, at 87-88, 115-16.

¹¹³ See Durham, *supra* note 4, at 37-43 (stating that the principles that were considered were concrete religious liberty norms that deserved worldwide acceptance).

cording to their own hierarchical and institutional structure, select, appoint and replace their personnel in accordance with their respective requirements and standards as well as with any freely accepted arrangement between them and their State, solicit and receive voluntary and other contributions;

16e engage in consultations with religious faiths, institutions and organizations in order to achieve a better understanding of the requirements of religious freedom;

16f respect the right of everyone to give and receive religious education in the language of his choice, individually or in association with others;

16g in this context respect, *inter alia*, the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions;

16h allow the training of religious personnel in appropriate institutions;

16i respect the right of individual believers and communities of believers to acquire, possess, and use sacred books, religious publications in the language of their choice and other articles and other materials related to the practice of religion or belief;

16j allow religious faiths, institutions and organizations to produce and import and disseminate religious publications and materials;

16k favorably consider the interest of religious communities in participating in public dialogue, *inter alia* [sic], through mass media.

17. The participating States recognize that the exercise of the above mentioned rights relating to the freedom of religion or belief may be subject only to such limitations as are provided by law and are consistent with their obligations under international law and with their international commitments. They will ensure in their laws and regulations and in their application the full and effective implementation of the freedom of thought, conscience, religion or belief.¹¹⁴

Anyone familiar with American constitutional law will note that this extensive list of aspects of religious freedom does not contain any explicit prohibition on government establishment of religion. This is not surprising. Although the constitutions of some European nations expressly proclaim the separation of church and state,¹¹⁵ or at the very least, neutrality on the matter of religion,¹¹⁶ other European states that endorse the Vienna Declaration's commitment to religious free-

¹¹⁴ *Id.* at 37-38.

¹¹⁵ *See, e.g.*, *Constituciao da Republica Portuguesa* [Constitution] art. 41(4) (Port.) (1982); *Konstytucja Rzeczypospolitej Polskiej* [Constitution] art. 82(2) (POL.) (1982). Other European nations declare themselves as secular states. *See, e.g.*, *La Constitution* [CONST.] art. 2 (Fr.) (1958).

¹¹⁶ *See, e.g.*, Art. 44.22, *Constitution of Ireland*, 1957.

dom have formally established churches,¹¹⁷ or at least recognize that one religion is regarded as having a unique place in the nation's history or culture.¹¹⁸

The Vienna Declaration lacks the status of enforceable law; the European Convention on Human Rights, however, provides a mechanism for aggrieved citizens to bring their claims before the European Court of Human Rights.¹¹⁹ Article 9 of the Convention adopts, almost word for word, the conscience and religion provisions of the Universal Declaration of Human Rights:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.¹²⁰

The application of these provisions by the European Court has been mixed. In *Kokkinakis v. Greece*,¹²¹ the European Court held that a criminal conviction of a Jehovah's Witness for illegal proselytizing was a violation of Article 9.¹²² And in *Darby v. Sweden*,¹²³ the Court held that a non-member of the established Swedish Lutheran Church was entitled to an exemption from a tax that supported the Church, to the extent that the tax supported religious rather than broadly charitable activity.¹²⁴

¹¹⁷ See, e.g., Kataetatio [Constitution] art. 3 (Greece) (1975) (establishing the Eastern Orthodox Church); Kongerget Norges Grundlov [Constitution] art. 2 (Nor.) (1814) (establishing the Evangelical Lutheran Church). The Church of England is the established church in England, pursuant to the Act of Supremacy. See Act of Supremacy, 1 Eliz. I, c.1 (1558).

¹¹⁸ See, e.g., Constitución [C.E.] [Constitution] art. 16(3) (Spain) (1978) (mandating the State is to maintain the appropriate relations of cooperation with the Catholic Church and other denominations).

¹¹⁹ See T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, in 2 RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 4, at 305-30.

¹²⁰ *Id.* at 308.

¹²¹ 260 Eur. Ct. H.R. (ser. A) at 18 (1993).

¹²² *Id.*

¹²³ 187 Eur. Ct. H.R. (ser. A) (1990). *Darby* and *Kokkinakis* are discussed at length in Gunn, *supra* note 119, at 316-25.

¹²⁴ The European Commission, the body that initially evaluates complaints under the European Convention on Human Rights, found that Article 9 was violated by the requirement that a dissenter pay a tax earmarked for specifically religious activity. Upon review, the Court agreed that the tax on Dr. Darby was improper, but based its ruling on the fact that he was denied an exemption from the tax because he was only a part-time resident of Sweden, whereas full-time residents were entitled to claim exemption as dissenters. See Gunn, *supra* note 119, at 316-18.

But in a number of other cases, the Court and the Commission¹²⁵ have rejected claims that an individual or group was exempted from a legal obligation generally applicable to the community.¹²⁶ In these cases, the reasoning of the Court in applying the balancing test of Section 2 of Article 9 is quite reminiscent of the United States Supreme Court's analysis of free exercise claims in *Smith*.¹²⁷ Even in *Kokkinakis*, the Court did not hold that proselytizing could never be punished, but rather that Greece had failed to justify the conviction at issue.¹²⁸

Perhaps more notably, the European Court has never suggested that a government may not privilege an established faith.¹²⁹ Thus, the existence of government support and even a system of taxing members of the established church for that church's support is unchallenged. And beyond the question of financial support, some observers have noted that the European Court and Commission grants more deference not only to established religions, but also to claims by members of "mainstream" religions.¹³⁰ Thus, in the view of the European Court, individual and minority rights of religious freedom do not necessarily imply government neutrality among religions. And just as clearly, these rights do not imply government neutrality between religion and irreligion. When the dissenting Evangelical Lutheran Church in Sweden challenged mandatory religious education in Swedish public schools conducted under the auspices of the established Swedish Lutheran Church, the European Commission negotiated a settlement granting Evangelical Lutherans an exemption.¹³¹ When an atheist sought a similar exemption from the same law, the Commission dismissed the claim as "manifestly ill-founded."¹³²

¹²⁵ See the discussion of the respective roles of the Commission and the Court as the adjudicative bodies under the European Convention on Human Rights in Gunn, *supra* note 119, at 305-06.

¹²⁶ See discussion and cases cited in Gunn, *supra* note 119, at 313-15.

¹²⁷ *Smith v. Employment Div.*, 494 U.S. 872 (1990); see *supra* notes 78-82 and accompanying text.

¹²⁸ See Gunn, *supra* note 119, at 324-25. Gunn notes that "the Court did not question the legitimacy of the Greek anti-proselytism law as a whole." *Id.* at 325.

¹²⁹ "[A] 'State Church system cannot in itself be considered to violate Article 9 on the Convention. In fact, such a system exists in several Contracting States and existed there already when the Convention was drafted and when they became parties to it.'" *Id.* at 312 (quoting *Darby v. Sweden*, 187 Eur. Ct. H.R. (ser. A) (1990)).

¹³⁰ Gunn finds that, with only two exceptions, "the European Commission always denied applications from religions that could be called 'new,' 'minority,' or 'nontraditional.'" *Id.* at 311. For further details, see the list of such case, *id.* at 311, n.28.

¹³¹ *Karnell and Hardt v. Sweden*, 1971 Y.B. Eur. Conv. on H.R. 676 (Eur. Comm'n on H.R.).

¹³² *Angelini v. Sweden*, App. No. 10941/83, 51 Eur. Comm'n H.R. Dec. & Rep. 41, 49 (1987). Both *Angelini* and *Karnell*, and similar instances of the European Commission rejecting claims by adherents of minority religions are discussed by Gunn, *supra* note 119, at 311-12.

The experience of the European Court and Commission suggests, then, that a legal system that affirms individual rights of religious freedom but does not prohibit state establishment of religion will show some degree of respect for the principle that coercion cannot be used to compel or prohibit belief, but will not take offense at unequal state treatment of different religions. Perhaps, though, this cautious application of religious freedom principles is at least partially a consequence of an international body exerting restraint in framing rules governing different societies with different histories concerning the relationship of church and state. An examination of a single nation's experience with a constitutional affirmation of religious freedom but no prohibition of a religious establishment might produce a somewhat different picture. If a purpose of our examination is to draw conclusions that might shed light on the proper interpretation of religious freedom in the United States, we would be well-advised to choose a nation that shares many of the cultural and legal values of the United States. And so, we will now turn our attention to the recent experience of Canadian courts in dealing with these issues.

III. FREEDOM OF RELIGION UNDER THE CHARTER IN CANADA

Canada stands somewhat between the United States and Great Britain in both its history regarding church-state relations and its position on the role of courts in protecting individual rights from abuse at the hands of other branches of government. For a former British colony, but one that achieved independence in a peaceful way, and in stages over time,¹³³ rather than by violent revolution, this is unsurprising.

As a British colony, Canada was familiar with the practice of formal religious establishment practiced in the United Kingdom,¹³⁴ but because of the religious diversity caused by the significant presence of francophone and largely Catholic Quebec, a strong form of single-denominational establishment was hardly a practical option.¹³⁵ Instead, we might expect government to support religion, but not to limit that support to a single denomination.

¹³³ A series of enactments shifted sovereign power from Britain to its former colony: the Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63 (Eng.), the British North America Act, 1867, 30 & 31 Vict., c. 3 (Eng.), and the Statute of Westminster, 1931, 22 George V, c. 4 (Eng.).

¹³⁴ For an overview of the history and present status of religious establishment in the United Kingdom, see Peter Cumper, *Religious Liberty in the United Kingdom*, in 2 RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 4, at 205-41.

¹³⁵ Issues of federalism, and particularly the question of the degree of autonomy that Quebec should have in order to retain its distinctive culture, have long been the most prominent issues in debates over Canadian constitutional reform. See DAVID MILNE, *THE NEW CANADIAN CONSTITUTION* 46-103, 135-64 (1982).

With respect to judicial protection of individual rights, Canada inherited the British tradition of parliamentary supremacy. The original Canadian constitutional documents¹³⁶ did not provide for judicially enforceable individual rights that would override legislative decisions.¹³⁷ In the years following World War II, however, pressure mounted for the adoption of a bill of rights that would have constitutional status, and empower courts to invalidate inconsistent legislation. And so, when the government of Prime Minister Trudeau embarked on the task of constitutional revision in 1980, a key component was the incorporation of a charter of rights into the constitutional framework.¹³⁸

Thus, the first thirty-four sections of the Constitution Act of 1982 comprise the Charter of Rights and Freedoms, Canada's first constitutionally entrenched individual rights provisions.¹³⁹ In empowering courts to override national or provincial legislation inconsistent with the Charter, Canada has taken a step in the direction of the system of judicial review long present in the United States. Still, significant differences remain. While the list of protected rights and freedoms largely resembles those protected by the United States Constitution, there are some differences.¹⁴⁰ But the most significant differences between the Charter and the rights language of the United States Constitution go beyond the enunciation of any particular right. First, the Charter explicitly provides for a form of judicial balancing, rather than suggesting that rights are absolute. Section 1 of the Charter provides that the rights contained in the Charter are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."¹⁴¹ An even

¹³⁶ See *supra* note 133.

¹³⁷ Canadian courts were empowered to invalidate legislation found to exceed the powers of either the national or provincial governments and invade the sphere of the other under the division of power called for by Canada's federal structure. Such decisions could indirectly expand the scope of individual rights. The Supreme Court of Canada has, for example, invalidated provincial regulations involving speech or religion on the grounds that those matters were within the exclusive control of Parliament. See, e.g., *Switzman v. Elbling* [1957] S.C.R. 285, 288; *Reference re Alberta Statutes* [1938] S.C.R. 100, 132-35.

¹³⁸ See generally MILNE, *supra* note 135, at 23-46.

¹³⁹ Canadian Charter of Rights and Freedoms, Canada Act, 1982, c. 11 (Eng.) [hereinafter *Canada Act, 1982*].

¹⁴⁰ For example, the Charter has no equivalent of the Second Amendment right to bear arms, nor does it contain a "takings clause." Section 7 of the Charter, which comes closest to the Due Process Clause of the United States Constitution, provides that "life, liberty and security of the person" (omitting "property") may not be taken away "except in accordance with the principle of fundamental justice." *Canada Act, 1982, supra* note 139, § 7. But Section 26 of the Charter, in language reminiscent of the Ninth Amendment, states that "[t]he guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada." *Id.* § 26.

¹⁴¹ *Canada Act, 1982, supra* note 139, § 1.

more striking difference from American law is contained in Section 33. Except with respect to voting rights,¹⁴² mobility rights,¹⁴³ and language rights,¹⁴⁴ this section provides that regardless of any judicial determination that a piece of national or provincial legislation violates the Charter, Parliament or the provincial legislature may expressly declare that the legislation "shall operate notwithstanding a provision . . . of this Charter."¹⁴⁵ Such a declaration is to be effective for five years, and may be re-enacted.¹⁴⁶ In other words, while courts are empowered to invalidate legislation as violation of the Charter, those decisions, unlike those in the United States, are not necessarily final.¹⁴⁷ A degree of parliamentary supremacy persists. While Section 1 and Section 33 are interesting and important contrasts to the United States constitutional framework, they will not be the subject of much discussion here. Instead, we will focus on Section 2, which deals with the same subject matter as the First Amendment, but not in precisely the same way. Section 2 provides:

Everyone has the following freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.¹⁴⁸

Subsections (b), (c) and (d) deal, in somewhat more detail, with the same freedoms as the speech and press clauses of the First Amendment,¹⁴⁹ but with respect to religion, we can see an obvious

¹⁴² See *id.* §§ 3-5 (referring to the "Democratic Rights" contained in the Canada Act).

¹⁴³ See *id.* § 6. Mobility rights, generally similar to the "right to travel" held to exist in the United States, protect the right of Canadian citizens to enter and leave Canada, and to take up residence in any province.

¹⁴⁴ See *id.* §§ 16-22. Language rights were among the most sensitive issues under consideration during the framing of the Charter. See MILNE, *supra* note 135.

¹⁴⁵ Canada Act, 1982, *supra* note 139, § 33.

¹⁴⁶ *Id.* Since elections for Parliament and provincial assemblies must be held at intervals of no longer than five years, see Canada Act, 1982, *supra* note 139, § 4(1), the five year limitation limits a single assembly's power to preserve its Section 33 override decision in a way that will bind future legislators.

¹⁴⁷ Section 33, with its denial to Canadian courts of the final word on constitutional issues, has been and continues to be perhaps the most widely debated part of the Charter. See CHRISTOPHER P. MANFREDI, JUDICIAL POWER AND THE CHARTER: CANADA AND THE PARADOX OF LIBERAL CONSTITUTIONALISM 199-211 (1993) and the sources cited therein.

¹⁴⁸ Canada Act, 1982, *supra* note 139, § 2.

¹⁴⁹ The First Amendment of the United States Constitution makes no explicit reference to freedom of association, but the United States Supreme Court has found such a right implicit in the amendment. See, e.g., *Cal. Democratic Party v. Jones*, 520 U.S. 567 (2000) (holding that a state law permitting non-party members to vote in a party primary election against the wishes of the party would violate the party members freedom of association); *Boy Scouts of Am. v. Dale*,

contrast. The Charter protects "freedoms of conscience and religion," but does not seek to limit government establishment of religion, at least explicitly. How significant will this omission be in differentiating the scope of religious freedom in Canada from the scope of the freedom in the United States? In the nearly two decades since enactment of the Charter, Canadian courts have dealt with a number of religious freedom claims quite similar to claims involved in United States cases. While we might expect that, given the textual and historic differences between the two nations' constitutional postures toward church and state, outcomes would differ significantly, in fact, resolution of a number of issues has been quite similar.

The first significant decision of the Supreme Court of Canada interpreting the Charter guarantee of freedom of conscience and religion was *R. v. Big M Drug Mart*.¹⁵⁰ Big M, charged with selling goods on Sunday in violation of the Lord's Day Act,¹⁵¹ challenged that Act as a violation of Section 2(a). In analyzing this religious freedom case, Chief Justice Dickson relied on concepts that American lawyers would associate more readily with Establishment Clause cases than with Free Exercise Clause cases. Initially, the Chief Justice found it significant that the Act, in his view, had the purpose of promoting Sunday worship, rather than the secular purpose of merely providing a uniform day of rest.¹⁵²

Dickson then discussed the meaning of "freedom of religion," and focused on non-coercion and equal treatment as essential components of the right. In discussing coercion, the Chief Justice used language that is more reminiscent of Justice Kennedy than Justice Scalia:¹⁵³

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others.¹⁵⁴

520 U.S. 640 (2000) (holding that a state law prohibiting discrimination on grounds of sexual orientation cannot be applied to violate Boy Scouts' freedom of association).

¹⁵⁰ [1985] 1 S.C.R. 295.

¹⁵¹ R.S.C., ch. L-13 (1970). With some exceptions, the Act generally prohibited commercial activity on Sunday. See *Big M Drug Mart* [1985] 1 S.C.R. at 301-02.

¹⁵² After examining the history of the Act in *Big M Drug Mart*, [1985] 1 S.C.R. at 316-28, Chief Justice Dickson concluded that "[a] finding that the *Lord's Day Act* has a secular purpose is, on the authorities, simply not possible. Its religious purpose, in compelling sabbatical observance, has been long-established and consistently maintained" *Id.* at 331.

¹⁵³ See *supra* notes 51-60 and accompanying text.

¹⁵⁴ *Big M Drug Mart*, [1985] 1 S.C.R. at 336-37.

Thus, despite the fact that the Act does not actually compel worship or belief, the Chief Justice found it to be coercive. Dickson continued, in language that makes coercion sound almost indistinguishable from Justice O'Connor's concept of endorsement:¹⁵⁵

To the extent that it binds all to a sectarian Christian ideal, the Lord's Day Act works a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture.¹⁵⁶

In addition to this expansive view of the non-coercion principle, Chief Justice Dickson also stressed that freedom of religion includes the right to have one's religion treated equally with other beliefs: "[a] free society is one which aims at equality with respect to the enjoyment of fundamental freedoms The protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity."¹⁵⁷

The Attorney General of Alberta, in defending the Lord's Day Act, stressed the absence of any establishment clause in the Charter, and contended that this omission meant that no statute that did not actually impede one's religious exercise could violate Section 2(a).¹⁵⁸ This argument was rejected, however: Chief Justice Dickson noted that "establishment" and "free exercise" "are not two totally separate and distinct categories."¹⁵⁹ Indeed, Dickson continued, "neither 'free exercise' nor 'anti-establishment' is a homogeneous category; each contains a broad spectrum of heterogeneous principles."¹⁶⁰

A final point of interest in *Big M* is Chief Justice Dickson's insistence that this synthesis of non-coercion and equality principles implicit in freedom of religion does not merely protect those who express religious sentiments. "Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice."¹⁶¹ In holding the Lord's Day Act unenforceable, the Canadian Supreme Court invoked a number of principles and concepts that are a familiar part of American Establishment Clause jurisprudence; namely, the purpose and effect of the statute in question, and the principles of non-

¹⁵⁵ See *supra* notes 47-50 and accompanying text.

¹⁵⁶ *Big M Drug Mart*, [1985] 1 S.C.R. at 337.

¹⁵⁷ *Id.* at 336-37.

¹⁵⁸ *Id.* at 339.

¹⁵⁹ *Id.* at 339-40.

¹⁶⁰ *Id.* at 340.

¹⁶¹ *Id.* at 347.

coercion and equal treatment of religions, and of religion as opposed to irreligion, to justify its conclusion.

The significance of purpose and effect, concepts criticized by American critics of the *Lemon* test,¹⁶² in Canadian religious freedom jurisprudence became evident shortly after *Big M*. In 1986, the Canadian Supreme Court refused to invalidate the Ontario Retail Business Holidays Act¹⁶³ and its limitation on Sunday retail business. The Act prohibited retail business on "holidays," defined as including Sundays and a number of other holidays, some but not all of which are of religious significance.¹⁶⁴ The Act also contained a significant exemption from the prohibition on Sunday retail business for small retailers who were closed on the preceding Saturday.¹⁶⁵

In light of these differences with the Lord's Day Act invalidated in *Big M*, the Canadian Supreme Court was able to hold that whatever burden the Ontario Act placed on religious freedom could be justified under the balancing test called for by Section 1 of the Charter.¹⁶⁶ However, unlike *Big M*, the Court accepted the fundamentally secular purpose of the statute, and, especially in light of the statutory exemption, found the negative effect on religious freedom to be sufficiently minimized.¹⁶⁷

No church-state issue in the United States has aroused more passion than the question of prayer in public schools;¹⁶⁸ it should not come as a great surprise that this issue presented itself to Canadian courts as well. Section 28(1) of Regulation 262 issued under Ontario's Education Act¹⁶⁹ provided that the public elementary school day would be opened or closed with the recitation of the Lord's Prayer and a Scripture reading.¹⁷⁰ Parents could request exemptions for such recitation for their children, but the parents of children attending Sudbury public schools, feeling that the peer pressure exerted on their children not to exempt themselves made this practice a violation of the freedom of religion, sought a ruling that the regulation was invalid as a violation of Section 2(a). The Ontario Court of Appeals sustained the challenge, despite the absence of a non-establishment provision in the Charter.¹⁷¹

¹⁶² See *supra* notes 43-57 and accompanying text.

¹⁶³ Retail Business Holidays Act, R.S.O., ch. 453 (1980).

¹⁶⁴ *Id.* § 2(1).

¹⁶⁵ *Id.* § 3(4) (a).

¹⁶⁶ *R. v. Edwards Books and Arts, Ltd.*, [1986] 2 S.C.R. 713, 716-17.

¹⁶⁷ *Id.*

¹⁶⁸ See *supra* notes 27-32 and accompanying text (discussing Supreme Court cases on school prayer).

¹⁶⁹ Education Act, R.S.O., ch. 129 (1980); R.R.O. Reg. 262, s.28(1).

¹⁷⁰ *Id.*

¹⁷¹ *Zylberberg v. Sudbury Bd. of Educ.*, [1988] 52 D.L.R. 4th 577.

The court found that the availability of an exemption for dissenting students did not eliminate the element of compulsion and coercion from the practice. In language that could easily have fit into any of the American school prayer cases, the court explained:

The three appellants chose not to seek an exemption from religious exercises because of their concern about differentiating their children from other pupils. The peer pressure and the class-room norms to which children are acutely sensitive, in our opinion, are real and pervasive and operate to compel members of religious minorities to conform with majority religious practices.¹⁷²

The Board of Education defended the system of school prayer partly on the basis that the exercises actually would have a positive benefit on children who are religious minorities, in that they would have to confront and learn to deal with their difference from the majority.¹⁷³ The court rejected this argument, which has been proposed in American school prayer cases as well,¹⁷⁴ with the comment that "[t]his insensitive approach . . . not only depreciates the position of religious minorities but also fails to take into account the feelings of young children."¹⁷⁵

Dissenting Judge Lacourcière argued that the presence of an exemption for unwilling pupils eliminated the element of coercion that was present in *Big M*,¹⁷⁶ and further argued that the reasoning of the majority, so close to American school prayer cases, was inappropriate when applying the principles of a document that did not include the equivalent of the Establishment Clause.¹⁷⁷ In light of Canadian history, the reference to God in the Preamble of the Charter,¹⁷⁸ and the absence of an explicit non-establishment provision, Lacourcière found that the Canadian Constitution contemplates "a bridge be-

¹⁷² *Id.* at 591.

¹⁷³ *Id.* at 592.

¹⁷⁴ The court rejected the argument that those objecting to the practice must prove actual "harm to individual pupils." *Id.*

¹⁷⁵ *Id.* at 592-93.

¹⁷⁶ Judge Lacourcière stated:

In contrast to the legislation impugned in *Big M*, it is clear that s.28 does not seek to compel participation in exercises with a religious component by all public school children. I agree that indirect forms of coercion may result in a Charter violation, but whatever may be the indirect effect of the regulation, it cannot reasonably be suggested that its purpose is to compel participation in these exercises when the exemption is cast in such broad terms.

Id. at 604 (Lacourcière, J., dissenting).

¹⁷⁷ "The relevance of American cases to the issue of the constitutional permissibility in Canada of state aid for religion is limited by the fact that there is no express equivalent of the establishment clause in s. 2(a) of the Charter." *Id.* at 608 (Lacourcière, J., dissenting).

¹⁷⁸ The Preamble begins: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law . . ." Canada Act, 1982, *supra* note 139, *quoted in Zylberberg* 52 D.L.R. 4th at 609 (Lacourcière, J., dissenting).

tween church and state rather than a wall of separation."¹⁷⁹ These arguments, however, did not sway the majority.¹⁸⁰

In 1990, the Ontario Court of Appeal held that a program of religious education in public schools of Ontario violated the Charter.¹⁸¹ In deference to increased sensitivity to religious pluralism, Ontario had modified its program of public school religious education to make it somewhat less focused on Christianity and more inclusive of other religious perspectives.¹⁸² As was the case with public school prayer, parents could seek exemption from religious education for their children.¹⁸³ The court, however, still found a violation of Section 2(a).

The court found that even in its modified form, the Ontario religious education program was not merely an objective survey of the beliefs of world religions, or a presentation of commonly held moral values, but was clearly meant to promote Christian belief as normative.¹⁸⁴ Drawing on the language and reasoning of *Big M*¹⁸⁵ and *Zylberberg*,¹⁸⁶ the court dismissed the argument that the availability of an exemption for parents of unwilling children was sufficient to negate the presence of coercion.¹⁸⁷ Once again using language that could easily fit into American Establishment Clause cases, the Ontario court found that "there are ways of encouraging the development of young people in public school of high standards of character, ethical ideals, and an understanding of moral values, without trespassing on the personal religious beliefs which they have learned at home or in their separate places of worship."¹⁸⁸

While American courts have consistently rejected attempts to conduct school prayer, the Supreme Court has been more permissive concerning religious invocations at the beginning of meetings of

¹⁷⁹ *Zylberberg*, 52 D.L.R. 4th at 609 (Lacourcière, J., dissenting).

¹⁸⁰ "[T]he absence of an establishment clause in s. 2(a) does not limit the protection it gives to freedom of conscience and religion." *Id.* at 595.

¹⁸¹ *Canadian Civil Liberties Ass'n v. Ontario (Education Minister)*, [1990] 65 D.L.R. 4th 1.

¹⁸² The detailed regulations, providing for two one-half hour periods of religious instruction per week, are set forth in *Canadian Civil Liberties Association*. See *id.* at 5-6. The court noted that "[o]riginally the curriculum of the board was exclusively Christian in form," but in recent years, "the curriculum did contain references to other faith." *Id.* at 7-8.

¹⁸³ See R.R.O., Reg. 262, s. 28(10) (1980), cited in *Canadian Civil Liberties Association*, 65 D.L.R. 4th at 6-8 ("In the 1986-87 school year, approximately 124 pupils out of 8,100 [in Elgin County] were excused from religious education programs at the request of their parents.").

¹⁸⁴ The court noted that while the curriculum had evolved from being openly directed at indoctrinating Christian views to include some reference to other world religions and some non-religious moral teachings, it was still heavily weighted toward Christianity. In addition, the emphasis with respect to non-Christian religions was historical and descriptive, but with respect to Christianity, much more was included concerning theory and belief. *Id.* at 28-39.

¹⁸⁵ See *supra* notes 150-61 and accompanying text.

¹⁸⁶ See *supra* notes 169-75 and accompanying text.

¹⁸⁷ *Canadian Civil Liberties Ass'n*, 65 D.L.R. 4th at 23-25.

¹⁸⁸ *Id.* at 40-41 (quoting the Report of the "Mackay Committee," Committee on Religious Education in the Public Schools of Ontario, *Report* (1969), at 21).

public bodies.¹⁸⁹ But the Ontario Court of Appeal cited Justice Brennan's dissent on this point¹⁹⁰ in holding that the recitation of the Lord's Prayer by the mayor and council of the town of Penetanguishene at the beginning of each council meeting infringed the freedom of religion of non-Christian residents who wished to attend the open meetings.¹⁹¹

The court found it "clear that the purpose of the recitation of the Lord's Prayer at the opening of council meetings is to impose a Christian moral tone on the deliberations of council."¹⁹² While the town maintained that an adult would feel no more than trivial coercion from the recitation, the court found no meaningful distinction between this case and *Zylberberg*. Although children may be more vulnerable than adults, "[j]ust as children are entitled to attend public schools and be free from coercion or pressure to conform to the religious practices of the majority, so everyone is entitled to attend public local council meetings and to enjoy the same freedom."¹⁹³

The court was unimpressed with the argument that longstanding tradition should insulate the prayer from scrutiny; it is here that Justice Brennan is cited to the effect that changing times and attitudes can render a practice once offensive to no one "highly offensive to many persons, the deeply devout and the nonbelievers alike."¹⁹⁴ However, the court did strongly suggest that a brief non-sectarian prayer might be an acceptable alternative to the identifiably Christian Lord's Prayer.¹⁹⁵

These cases could all easily fit into the mainstream of United States Establishment Clause jurisprudence. There is, however, one aspect of Canadian church-state constitutional law that is clearly different from the American model. Canada has had a long history of government financial support for religious, as well as secular, schools. This is unsurprising in light of not only the British history of established religion, but also the close connection between religion, language, and culture that has been so much a part of Canada's attempt to unite English and French speaking communities while allowing them to retain their own identities.¹⁹⁶

¹⁸⁹ See *Marsh v. Chambers*, 463 U.S. 783, 795 (1983) (holding that religious invocation at the opening of state legislative session did not violate the Establishment Clause).

¹⁹⁰ See *id.* at 795-822 (Brennan, J., dissenting) (maintaining that religious invocation at the opening of state legislative sessions violates the Establishment Clause).

¹⁹¹ *Freitag v. Town of Penetanguishene*, [1999] 179 D.L.R. 4th 150, 164.

¹⁹² *Id.* at 157.

¹⁹³ *Id.* at 162.

¹⁹⁴ *Id.* at 165 (quoting *Marsh*, 463 U.S. at 817 (Brennan, J., dissenting)).

¹⁹⁵ *Freitag*, 179 D.L.R. 4th at 166.

¹⁹⁶ See generally MILNE, *supra* note 135, at 46-103, 135-64.

Section 93 of Canada's original constitutional document, the Constitution Act of 1867,¹⁹⁷ grants exclusive control of education to the provinces, and also preserves the rights and privileges of denominational schools existing by virtue of statutes in effect at that time. The provision was interpreted narrowly; in 1928 it was held that the provinces had broad power to determine the degree of public funding of religious schools. In 1984, when the government of Ontario sought to expand public funding for Catholic schools, previously extended only to grade 10, to include all secondary school grades,¹⁹⁸ the enactment was challenged as a violation of the newly enacted Charter.¹⁹⁹

The challengers alleged that this funding, not available to all religions, violated the principle of equal treatment found in Section 15(1), as well as the freedom of religion guarantee of Section 2(a).²⁰⁰ The Canadian Supreme Court did not disagree with the contention that, standing alone, Section 15(1) would seem to prohibit provincial aid to religious schools, but went on to hold that the Charter clearly did not have the effect of overriding Section 93 of the Constitution Act of 1867, which specifically empowered the provinces to choose to fund religious schools.²⁰¹ While government funding of religious schools is an accommodation that clearly distinguishes Canadian church-state jurisprudence from that of the United States, the implication of the reasoning behind the Canadian Court's affirmation of Ontario's funding is that were it not for the specific language and history of Section 93 of the Constitution Act, and the Charter language specifically stating that the Charter is not to abrogate "any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools,"²⁰² Section 15(1) of the Charter would bar such funding.²⁰³

¹⁹⁷ British North America Act, 1867, 30 & 31 Vict., c.3 (Eng.) (renamed Constitution Act of 1867), § 93.

¹⁹⁸ Bill 30, An Act to Amend the Education Act, Stat. Ont. 1986, c.21.

¹⁹⁹ *In re An Act to Amend the Education Act* [1987] 1 S.C.R. 1148.

²⁰⁰ *See id.* at 1166 (arguing that providing benefits to Roman Catholic schools that are not available to other religious schools violates the equality guarantee in Section 15(1) of the Charter). Section 15(1) of the Charter reads, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Canada Act, 1982, *supra* note 139, § 15.

²⁰¹ *See id.* at 1196 ("The Charter cannot be applied so as to abrogate or derogate from rights or privileges guaranteed by or under the Constitution.").

²⁰² Canada Act, 1982, *supra* note 139, § 29.

²⁰³ *See In re An Act to Amend the Education Act*, [1987] 1 S.C.R. at 1197 (stating that Section 29 of the Charter "was put there simply to emphasize that the special treatment guaranteed by the constitution [of 1867] to denominational, separate or dissentient schools, even if it sits uncomfortably with the concept of equality embodied in the Charter because not available to other schools, is nevertheless not impaired by the Charter").

Thus, the Canadian constitutional law of church-state in the era of the Charter presents us with some differences, but many remarkable similarities, to the American position on the same issues. Is it possible, then, to learn something from this experience with a constitutional document that lacks a specific prohibition of government establishment of religion that might nevertheless shed some light on the proper interpretation of the scope of the First Amendment's Establishment Clause?

IV. WHAT CAN CANADIAN RELIGIOUS FREEDOM CASES TELL US ABOUT THE ESTABLISHMENT CLAUSE?

Any inquiry into what foreign court insights and decisions interpreting their own constitutions can provide for the interpretation of the United States Constitution might be dismissed as having no value. Although it is common for the courts of other common law nations to draw on American cases, and cite them as persuasive authority,²⁰⁴ it has been quite uncommon for American courts to cite the decisions of the courts of other nations in interpreting the provisions of United States law or the United States Constitution. When Justice Breyer recently referred to the example of other federalist nations to support his dissenting opinion in a case presenting Tenth Amendment questions,²⁰⁵ Justice Scalia's majority opinion explicitly rejected the contention that the constitutional experience of other countries could be relevant in an inquiry involving the United States Constitution.²⁰⁶

But there are strong reasons not to ignore foreign precedent, at least where it comes from nations with reasonably similar legal systems, and where that precedent seeks to vindicate values held in common. Especially when dealing with provisions of the Bill of Rights, it is difficult to believe that the Framers doubted that they were endorsing rights which would and should eventually be re-

²⁰⁴ See, e.g., *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, 367 ("The courts in the United States have had almost two hundred years experience . . . and it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States courts."); *R. v. Rahey*, [1987] 1 S.C.R. 588, 639 (stating "[I]t is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of *Charter* guarantees that have counterparts in the United States Constitution . . ."). But see *Rahey*, [1987] 1 S.C.R. at 639 (warning that courts "should be wary of drawing too ready a parallel between constitutions born to different countries in different ages").

²⁰⁵ See *Printz v. United States*, 521 U.S. 898, 976-78 (1997) (Breyer, J., dissenting) (suggesting that the experience of other countries may "cast an empirical light on the consequences of different solutions to a common legal problem").

²⁰⁶ See *id.* at 921 n.11 (commenting that comparative analysis with other countries may be relevant when writing a constitution, but not when interpreting one).

garded as universal.²⁰⁷ And when those rights become widely accepted in the international community, debate over their scope becomes both inevitable and salutary.

As we have seen, a basic commitment to religious freedom has become a widely accepted international norm, one that is embraced by all western democracies.²⁰⁸ And just as the conception of the scope of that freedom evolved in nineteenth century America from bare toleration of dissenters to, at the very least, equal treatment of all faiths, western democracies have traveled the same path.²⁰⁹ This has been true even in England, where the formal establishment of religion persists.²¹⁰ When we combine this basically similar attitude toward religious freedom with a common law system that includes a written constitutional commitment to that freedom and the power of judicial review, as in Canada, it would seem that we have a very useful source of comparison with United States law.

And this is particularly so where our goal is not to contend that United States courts should simply follow the reasoning of another nation's judiciary, but rather to propose that the textual and historical differences between Canada and the United States on this point suggest that American courts should go beyond the non-establishment baseline that exists in Canada. With this justification of the entire inquiry having been stated, we can now pose the question of what the Canadian religious freedom cases can tell us about the religion clauses of the First Amendment.

The first obvious lesson that can be drawn from the Canadian experience is that the concepts of non-establishment and free exercise are clearly not two distinct ideas, but rather two aspects of a single commitment to religious freedom. This is not a new idea in American jurisprudence; the fact that the Framers of the First Amendment expected the religion clauses to work in harmony has been frequently noted.²¹¹ Still, in the United States, a religious freedom case is almost

²⁰⁷ For a discussion of the impact of natural rights theory on the founding generation, see Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978). For a discussion of the influence of natural law and the "law of nations" on the Framers of the Fourteenth Amendment, see DANIEL A. FARBER & SUZANNA SHERK, *A HISTORY OF THE AMERICAN CONSTITUTION* 258-71 (1990).

²⁰⁸ See *supra* notes 107-20 and accompanying text.

²⁰⁹ On the matter of this "Lockean revolution in religious liberty," see Durham, *supra* note 4, at 7-12 and the sources cited in the notes therein.

²¹⁰ See Cumper, *supra* note 134.

²¹¹ For example, Professor Kurland's proposal that the religion clauses should be synthesized into a principle that would provide that "religion may not be used as a basis for classification for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties and obligations." PHILIP KURLAND, *RELIGION AND THE LAW* 18 (1962). See also Stephen M. Shapiro, Note, *Toward a Uniform Valuation of the Religion Guarantees*, 80 YALE L.J. 77, 78 (1970) (positing that since both government aid and government restraint

inevitably classified as either a Free Exercise or an Establishment Clause case, and once that classification is made, concerns underlying the other clause are pushed aside.

This phenomenon can be seen to work in both separationist and accommodationist directions. Cases brought challenging public prayer, easily classified as Establishment Clause cases, might be seen differently if they were conceived of as concerning the rights of those who want to publicly express their faith.²¹² In contrast, cases involving free exercise claims can overlook the possibility of troubling government favoritism toward religion created by generous exemptions, either judicially or legislatively created,²¹³ from obligations imposed on others, granted to believers.

Each clause, were it to stand alone, contains clear elements of the other. The freedom of free exercise could be abrogated by government forcing one to adhere to an official set of beliefs as easily as by government stifling expression of one's own. Of course, one aspect of the classic religious establishments that the First Amendment framers must have had in mind was the active suppression of dissenting belief.²¹⁴ Still, as history has shown, the dual aspects of the First Amendment commitment to religious freedom do create a significant degree of tension. Government's position toward religion should be neither too warm nor too cold.

To describe the process of attempting to resolve this tension as "balancing" may be unwise. The normal conception of balancing involves the weighing of different interests against each other.²¹⁵ But here, the interest behind each clause is the same—that is, the preservation of freedom of conscience and religion. Perhaps a better way

pose an identical threat to the underlying value of religious liberty, "a standard of uniform strictness" should be applied to establishment and free exercise cases).

²¹² See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 323 (2000) (Rehnquist, C.J., dissenting) (arguing in favor of permitting student-led invocations at high school football games by suggesting that the Court's decision impinges on free exercise values).

²¹³ Justice Scalia's opinion for the Court in *Employment Div. v. Smith* could be seen as protective of Establishment Clause values, as well as merely limiting free exercise values. See *Smith*, 494 U.S. 872 (1990). Yet the opinion is unconcerned with the possible Establishment Clause problems posed by the availability of legislative exemptions to those religious adherents who can muster majority support, and the unavailability of such exemptions to those who cannot. See *id.* at 890.

²¹⁴ At the time of the framing of the Bill of Rights, the English establishment, while beginning to ease its restrictions on Protestant dissenters, was still far from granting full freedom to those outside of the Church of England. See Cumper, *supra* note 134, at 207-11.

²¹⁵ As applied to the religion clauses, see Derek H. Davis, *Resolving Not To Resolve the Tension Between the Establishment and Free Exercise Clauses*, 38 J. CHURCH & STATE 245 (1996) (expressing the tension between the clauses and the need to balance them can lead to maximizing religious liberty); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1644 (1993) ("The Free Exercise Clause works as a counterweight to the Establishment Clause; it gives back what the Establishment Cause takes away.").

to describe the process is as one of adjusting the degree to which government may or must act or refrain from acting in order to further that interest. However described, though, courts called upon to address religious freedom cases must decide just how sensitive to be to the twin problems of excessive cooperation and excessive distance. The degree of sensitivity to each of these dangers is unlikely to be quite the same in different societies; differences in history and culture will come into play. But, on the other hand, in societies with a sincere underlying commitment to religious freedom, these differences are not likely to be drastic.

At first glance, we might expect that the Canadian Charter, in the absence of an explicit commitment to non-establishment, would be, if not entirely insensitive to establishment concerns, at least far less sensitive to them than American jurisprudence. But Canadian cases, as we have seen, do not bear this out. Rather, they demonstrate that a reasonably strong sensitivity to establishment concerns is implicit in the commitment to religious freedom. And this brings us to the question posed in this Article's title: in light of this, is the Establishment Clause redundant? More specifically, could we expect American constitutional law to adopt at least the non-establishment principles put forward by the accommodationist wing of the Supreme Court even if the First Amendment contained no Establishment Clause, but merely protected free exercise? And if that is so, is that sufficiently troubling to cast serious doubt on the accommodationist view of the Establishment Clause?

It would seem that the view of the Establishment Clause put forward by strong accommodationists on the Court and in the academy consists basically of three points. First, the Establishment Clause is violated by government coercion of religious belief or expression. Strong accommodationists would define coercion to include only those restraints described by Justice Scalia as coercive, not the psychological coercion that troubles Justice Kennedy.²¹⁶ Second, the clause prohibits government policy that favors one religion over another, but not government policy that favors religion over irreligion.²¹⁷ And finally, the clause prohibits some forms of direct government financial aid to churches, but by no means prohibits all forms of aid to religious institutions. Would these principles exist as aspects of constitutionally protected free exercise even if there were no Establishment Clause?

The first of these three Establishment Clause principles can easily be seen to also be implicit in the concept of free exercise of religion or, to use the Charter term that hardly seems substantively different,

²¹⁶ See *supra* note 51 and accompanying text.

²¹⁷ See *supra* note 52 and accompanying text.

freedom of religion. As the Canadian cases demonstrate, the freedom to profess one's own beliefs necessarily implies that government will not coerce the profession of different views. Further, these cases go beyond Justice Scalia's narrow definition of coercion to include psychological coercion. As both supporters and critics of Justice Kennedy's definition of coercion have noted, this more sweeping view of coercion is quite close to Justice O'Connor's definition of endorsement.²¹⁸ In other words, not only is it clear that Justice Scalia's non-coercion principle is implicit in the Free Exercise Clause, even in the absence of an explicit non-Establishment Clause, it is quite possible that Justice O'Connor's non-endorsement principle is as well.

Canadian courts, as we have seen, also find that no explicit non-Establishment Clause is required to impose on government the duty to treat all religious beliefs equally.²¹⁹ This, of course, is not entirely independent of the non-coercion principle as defined by Chief Justice Dickson in *Big M*: "coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others."²²⁰ Providing benefits to one religion and not another "imports disparate impact destructive of . . . religious freedom . . ."²²¹ Once again, the concept of freedom to follow one's own religion, standing alone, implies at the very least equal treatment of all religion. And Dickson went further in *Big M* to state that the principle of equal treatment had to be extended to non-believers.²²²

Extending the equal treatment principle beyond the command to treat all religions equally to include equal treatment of religion and irreligion may be more a consequence of the practical difficulty of defining terms than anything else. History contains numerous instances of new religions being branded as atheistic because of their rejection of prevailing concepts of God.²²³ Most Americans would probably maintain that an irreducible core of religion is belief in a transcendent supreme being, but at the same time Buddhism, which

²¹⁸ See *supra* notes 47-50 and accompanying text.

²¹⁹ See *supra* note 157 and accompanying text.

²²⁰ *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, 336-37.

²²¹ *Id.* at 337.

²²² *Id.* at 347.

²²³ In his book, *DOES GOD EXIST: AN ANSWER FOR TODAY*, Hans Küng wrote:

Socrates was condemned to death as *atheos*, as "godless." But he had by no means rejected any kind of God; he had rejected, like many other educated Greeks, only the customary veneration of the gods of the Greek *polis*. Atheism properly so called does not deny merely a plurality of gods or merely a particular way of worshipping God or even simply a personal, "theistic" God. It denies any God and any divine reality . . .

HANS KÜNG, *DOES GOD EXIST: AN ANSWER FOR TODAY* 189 (Edward Quinn trans., 1980). Küng discusses eighteenth and nineteenth century thinkers who put forth conceptions of God that are radically different from that of a single, transcendent being actively intervening in human affairs, but contends that these conceptions, such as deism, the "basically pantheistic attitude of Spinoza, the philosophy of Fichte, cannot be truly regarded as atheistic." *Id.* at 127-61.

lacks such a concept, is easily thought of as being a religion.²²⁴ Is pantheism, or any of the traditional nature religions, which do not distinguish nature from God, a religion? If so, does that make materialism a religion as well? And ultimately, does not an unbending atheism share many of the aspects of religion? It can serve as an organizing principle for one's ethics and belief system, and ultimately, its underlying assumptions are neither provable nor disprovable by rational argument.²²⁵

American courts have been called upon to classify beliefs and practices as religious or merely secular in a number of contexts.²²⁶ Perhaps the most prominent cases involved claims of conscientious objector status from the Vietnam era military draft.²²⁷ The Selective Service Act provided for exemption from military service for those whose consistent pacifism was grounded in religious belief, but specifically excluded those who based the same position on secular ethical belief.²²⁸ The Supreme Court, perhaps mindful of the serious Establishment Clause implications of granting coveted exemptions to only those who professed traditional, conventional, religious beliefs, drew on the writings of Paul Tillich and other liberal theologians to hold that religious beliefs included any set of ultimate concerns that animated an individual's life in essentially the same manner as traditional religious beliefs would.²²⁹

With the distinction between religious beliefs and merely philosophical beliefs blurred, it would seem almost inevitable that the adoption of a principle that government must treat all religions equally would compel the further conclusion that, as Justice Dickson stated in *Big M*, belief and unbelief must also be accorded equal treatment.²³⁰

If non-coercion and equal treatment are implicit in the concept of free exercise, it might be thought that the independent force of the Establishment Clause can be found in the principle of no direct gov-

²²⁴ In *Torcaso v. Watkins*, 367 U.S. 488 (1961), the Supreme Court recognized that there are "religions . . . which do not teach what would generally be considered a belief in the existence of God . . . [including] Buddhism, Taoism, Ethical Culture, Secular Humanism, and others." *Id.* at 495 n.11.

²²⁵ See KUNG, *supra* note 223, at 329 ("All proofs or arguments of the eminent atheists are certainly adequate to raise doubts about the existence of God but not to make God's non-existence unquestionable Atheism, too, lives by an undemonstrable faith . . .").

²²⁶ See, e.g., *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1982) (holding that the "naturalist" organization MOVE does not qualify as a religion); *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979) (finding that Transcendental Meditation is considered to be a religion).

²²⁷ See *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965).

²²⁸ *Seeger*, 380 U.S. at 164-65.

²²⁹ *Id.* at 180-83.

²³⁰ See *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295.

ernment financial aid to religions. With respect to government aid to denominational schools, we do see a difference between the acceptance of such aid in Canada and its limitation in the United States.²³¹ And surely the practice of European governments of imposing mandatory obligations on citizens to support established churches out of general or special tax revenue²³² was one of the paramount aspects of establishment that offended eighteenth century American separationists.²³³

Still, even here there is some convergence between American constitutional law, with an Establishment Clause, and Canadian law, without one. Drawing on the equality principle, the United States Supreme Court recently held that government support of activity of religious organizations that is analogous to the work of similarly supported secular organizations is permissible, and perhaps even mandatory.²³⁴ And while direct government aid to religious schools is still generally prohibited, indirect assistance through the provision of tax credits or vouchers to parents may well be given the Supreme Court's blessing in the near future.²³⁵ At the same time, the Canadian Supreme Court has approved government support of religious schools, but has done so on the basis of a specific constitutional provision permitting such aid.²³⁶ This suggests that in the absence of such a specific constitutional provision, the inequality that results from funding religious school systems that have substantial constituencies and leaving others with only the alternative of public schooling would present constitutional problems.²³⁷ It should also be noted that the

²³¹ See *supra* notes 196-201 and accompanying text.

²³² Government financial aid to preferred or to all recognized churches is still fairly common. See Durham, *supra* note 4, at 20-21.

²³³ See generally Douglas Laycock, "Nonpreferential" Aid To Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986).

²³⁴ See *Agostini v. Felton*, 521 U.S. 203 (1997) (finding that public school teachers may provide remedial educational services on premises of religious schools); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (holding that a student publication at state university that promotes religious views is entitled to equal university funding with other student publications). See also *Mitchell v. Helms*, 530 U.S. 793 (2000) (upholding a program lending educational materials and equipment to public and private schools). The four Justice plurality in *Mitchell* set forth probably the strongest endorsement of "nonpreferential" aid to religion ever found in a Supreme Court opinion:

If the religious, irreligious and areligious are all alike eligible for government aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination.

Mitchell, 530 U.S. at 809-10.

²³⁵ See *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000) (holding voucher program unconstitutional), *cert. granted*, 533 U.S. 976 (2001) (No. 00-1751).

²³⁶ See *supra* notes 196-203 and accompanying text.

²³⁷ See *supra* notes 200-03 and accompanying text.

Canadian Supreme Court has held that provinces are under no obligation to fund denominational schools;²³⁸ they may, as Ontario has, choose to organize schools on the basis of language communities rather than denomination.

What, then, does all this mean? First, it clearly indicates that to seek to define the boundaries of the non-establishment principle by inquiring into the specific history behind the Establishment Clause itself may be a serious mistake. To do so can easily lead to the conclusion that the clause was meant only to ban specific aspects of then prevailing religious establishments, such as taxation for the support of an established church, and nothing else. This can, in turn, lead to the conclusion that if a government practice was not considered to be one of these unique aspects of eighteenth century religious establishments, then that practice presents no constitutional problem. But this ignores the non-establishment principles implicit in the concept of religious freedom, or, in the words of the First Amendment, free exercise.

We might ask ourselves what the law of church-state in the United States would be if the First Amendment had merely spoken of free exercise, and had contained no Establishment Clause. One might assume that there would then be no constitutional limitation on the types or degree of support that government might provide to a religion, or to religion in general. But that assumption is a consequence of seeing the religion clauses as, while related to each other, pursuing different interests, one beneficial to government sensitivity to religious concerns, the other hostile.

The Canadian decisions under Sections 2(a) and 15(1) of the Charter suggest a very different conclusion. Were American courts called upon to interpret the content of a declaration of religious freedom against a background of widely held western ideas of what that freedom entails, it is likely that they, like their Canadian counterparts, would recognize that the non-establishment principle, and many of the specific conclusions that have been compelled by the Establishment Clause of the First Amendment would also be required even in the absence of that clause.

Is the Establishment Clause, then, redundant? To a large extent, yes. But that does not mean that it has no significance. Besides its application to specific practices such as direct government funding, it stands as a reminder that in adjusting the degree to which accommodationist values may be pursued by government, close attention must be paid to non-establishment concerns. Those who argue that the First Amendment Establishment Clause is violated only by coercion

²³⁸ See *Adler v. Ontario*, [1994] 116 D.L.R. 4th 1.

narrowly defined, or by favoritism of one religion over another, and not by favoritism of religion in general over irreligion, must confront what would seem to be a paradox. For they are arguing that in a constitutional system that specifically calls attention to the non-establishment principles that are part of the overall concept of religious freedom, those principles should be applied less vigorously than they are in a constitutional system that lacks an establishment clause.